JAYAKUMAR RAJOO MOHAMAD
v. CIMB AVIVA TAKAFUL BHD

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: B-02-2926-12-2012]
3 DECEMBER 2014

INSURANCE: *Motor insurance – Repudiation – New owner continued renewing insurance policy in name of previous insured who had passed away – Application by insurance company for declaration that motor insurance was void and unenforceable ('declaration proceedings') – Action initiated by third party for loss and damages in Sessions Court withdrawn – Intervention in declaration proceedings by third party – Whether declaration sought made after liability incurred – Whether insurance company precluded from repudiating liability – Whether proviso to s. 96(3) of Road Transport Act 1987 applicable – Whether date when liability incurred was date of accident or date when judgment on liability pronounced*

The respondent was a licensed Takaful insurance company. On 25 June 2007, the respondent issued a Takaful motor insurance policy in respect of a motor car ('the car') for the period of 25 June 2007 until 24 June 2008. The insured was stated as one Wan Abdullah ('insured'). On 28 September 2007, the car driven by the insured collided into a motorcycle ridden by the appellant, thereby causing injuries to the appellant. Investigations carried out by the respondent revealed that the insured had passed away on 19 August 2004. The respondent then filed an application to the High Court ('the proceedings') for a declaration that the motor insurance was void and unenforceable pursuant to s. 96(3) of the Road Transport Act 1987 ('RTA'). Meanwhile, on 14 July 2009, the appellant filed an action at the Sessions Court ('Sessions Court action') against the insured for loss and damages arising from the accident. However, the Sessions Court action was subsequently withdrawn. Investigations by the respondent revealed that one Noraini had taken over the possession of the car after the insured's demise in 2004. However, Noraini had continued renewing the insurance in the name of the insured. On 5 January 2012, the appellant intervened in the proceedings. The appellant argued, *inter alia,* that the respondent's application for the declaration under s. 96(3) of the RTA was made after the accident *ie*, after the liability incurred. As such, it would not be in accordance with s. 96(3) of the RTA for the court to grant the declaration sought. The High Court however granted the declaration sought by the respondent. Dissatisfied, the appellant appealed against the said decision. The issue that arose for determination was whether the date the liability was incurred was the date of the accident or the date when judgment on liability was pronounced.

Held (dismissing appeal with no order as to costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The proviso to sub-s. (3) of s. 96 RTA should be read together with the subsection. Subsection (3) provides that the insurer shall not be liable to pay any sums if 'before the date the liability was incurred' the insurer has obtained a declaration from court. However, the proviso also provides that the insurer will still be liable if the application for the declaration was only made after judgment was obtained. (para 26)

(2) A reading of the proviso clearly advances the meaning of 'the date the liability was incurred' which is the date when judgment has been obtained. In a running down action, the plaintiff's claim for damages is based on the tort of negligence. Prior to the trial of the action, liability in damages has not yet been incurred. Therefore, 'the date liability is incurred' within the meaning of sub-s. (3) must be held to have the meaning that liability is only incurred when judgment on liability is pronounced by a court after full trial. (paras 27 & 28)

(3) On the facts of the case, no judgment had been obtained and the Sessions Court action was withdrawn by the appellant with liberty to file afresh. When the application for the declaration by the respondent was filed, there was no judgment. As such, the proviso does not apply to deny the respondent of the benefit of the declaration it had obtained. Consequently, the respondent was entitled to the benefit of the declaration obtained pursuant to sub-s. (3) of s. 96 RTA. (para 29)

Bahasa Malaysia *Translation Of Headnotes*

Responden adalah sebuah syarikat insurans Takaful berlesen. Pada 25 Jun 2007, responden telah mengeluarkan polisi insurans motor Takaful untuk sebuah motokar ('kereta') untuk tempoh 25 Jun 2007 sehingga 24 Jun 2008. Pihak yang diinsuranskan dinyatakan sebagai Wan Abdullah (pihak yang diinsuranskan). Pada 28 September 2007, kereta yang dipandu oleh pihak yang diinsuranskan telah melanggar sebuah motosikal yang ditunggang oleh perayu, dengan itu menyebabkan kecederaan kepada perayu. Siasatan yang dijalankan oleh responden mendedahkan bahawa pihak yang diinsuranskan telah meninggal dunia pada 19 Ogos 2004. Responden kemudian memfailkan permohonan kepada Mahkamah Tinggi ('prosiding tersebut') untuk satu penetapan bahawa insurans motokar tersebut tidak sah dan tidak boleh dikuatkuasakan berdasarkan s. 96(3) Akta Pengangkutan Jalan 1987 ('RTA'). Sementara itu, pada 14 Julai 2009, perayu telah memfailkan satu tindakan guaman di Mahkamah Sesyen ('tindakan Mahkamah Sesyen') terhadap pihak yang diinsuranskan untuk menuntut ganti rugi dan pampasan yang berbangkit daripada kemalangan tersebut. Walau bagaimanapun, tindakan Mahkamah Sesyen tersebut kemudiannya telah ditarik balik. Siasatan oleh responden

mendedahkan bahawa seorang bernama Noraini telah mengambil alih milikan kereta selepas kematian pihak yang diinsuranskan pada tahun 2004. Walau bagaimanapun, Noraini terus memperbaharui insurans atas nama pihak yang diinsuranskan. Pada 5 Januari 2012, perayu telah mencelah dalam prosiding tersebut. Perayu menghujahkan, antara lain, bahawa permohonan responden untuk penetapan di bawah s. 96(3) RTA dibuat selepas kemalangan berlaku iaitu selepas liabiliti ditanggung. Oleh itu, untuk mahkamah membenarkan penetapan yang dipohon adalah bukan dengan pematuhan s. 96(3) RTA. Mahkamah Tinggi, bagaimanapun, telah membenarkan penetapan yang dipohon oleh responden. Tidak berpuas hati, perayu telah merayu terhadap keputusan Mahkamah Tinggi. Isu yang dibangkitkan untuk pertimbangan mahkamah adalah sama ada tarikh liabiliti ditanggung adalah pada tarikh kemalangan atau tarikh apabila penghakiman mengenai liabiliti diberikan.

Diputuskan (menolak rayuan tanpa perintah untuk kos)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Proviso kepada sub-s. (3) kepada s. 96 RTA hendaklah dibaca bersama dengan subseksyen tersebut. Subseksyen (3) memperuntukkan bahawa syarikat insurans tidak bertanggungjawab untuk membayar apa-apa jumlah jika 'sebelum tarikh liabiliti ditanggung' syarikat insurans telah memperolehi penetapan daripada mahkamah. Walau bagaimanapun, proviso juga menyatakan bahawa syarikat insurans masih akan bertanggungjawab sekiranya permohonan untuk penetapan dibuat hanya selepas penghakiman diperolehi.

(2) Penelaahan ke atas proviso dengan jelas menyatakan pengertian 'tarikh liabiliti ditanggung' iaitu tarikh apabila penghakiman diperolehi. Dalam suatu kes kemalangan, tuntutan plaintif bagi ganti rugi adalah berdasarkan tort kecuaian. Sebelum perbicaraan tindakan tersebut, liabiliti dalam ganti rugi belum ditanggung. Oleh itu, 'tarikh liabiliti ditanggung' dalam maksud sub-s. (3) harus diputuskan untuk mempunyai pengertian bahawa liabiliti hanya ditanggung apabila penghakiman diumumkan oleh mahkamah selepas perbicaraan penuh.

(3) Menurut fakta kes, tiada penghakiman yang telah diperolehi dan tindakan Mahkamah Sesyen telah ditarik balik oleh perayu. Apabila permohonan bagi penetapan oleh responden difailkan, tidak ada penghakiman. Oleh itu, proviso tidak boleh digunapakai untuk menafikan responden daripada faedah penetapan tersebut. Oleh itu, responden berhak mendapat faedah penetapan yang diperolehi menurut sub-s. (3) kepada s. 96 RTA.

Case(s) referred to:

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***

Barnett v. King [1891] 1 Ch 4 ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1978] 1 LNS 26 FC ***(refd)***

Ellis v. Pond [1898] 1 QB 426 ***(refd)***

Kurnia Insurans (Malaysia) Bhd v. Nik Mohd Faizul Nik Mustafa & Anor [2013] 1 LNS 40 HC ***(refd)***

Littlewood v. George Wimpey & Co [1953] 2 All ER 915 ***(refd)***

Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209 FC ***(refd)***

Magor & St Mellons Rural District Council v. Newport Corporation [1952] AC 189 ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (Malaysia) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysian Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

Tahan Insurance Malaysia Bhd v. Ong Choo Tian & Anor [2004] 7 CLJ 270 HC ***(refd)***

Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***

Warburton v. Loveland [1832] 2 D & CL 480 ***(refd)***

Wolmershausen v. Gullick [1893] 2 Ch 514 ***(refd)***

Woodward v. Watt [1853] 2 E & B 452 ***(refd)***

Yeo Peck Chie v. KS Gill & Co [1946] 1 LNS 35 PC ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 17A

Road Transport Act 1987, s. 96(1), (2), (3)

For the appellant - R Sivaraja; M/s Sivaraja & Co

For the respondent - Mohd Zaini Marzuki; M/s Aznur Mazwin & Assocs

[Appeal from High Court, Shah Alam, Originating Summons No: 24-2615-10-2011]

Reported by Sandra Gabriel

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This appeal relates to a declaration of the High Court that a Takaful motor insurance is void and unenforceable pursuant to s. 96(3) of the Road Transport Act 1987 (RTA 1987). After hearing submissions of counsel of the parties, we dismissed the appeal. We now give our grounds for dismissing the appeal.

Brief Account Of The Salient Facts

[2] CIMB Aviva Takaful Berhad (the respondent) was a licensed Takaful insurance company pursuant to the Takaful Act 1984.

[3] On 25 June 2007, the respondent issued a Takaful motor insurance policy in respect of a motorcar model Ford Escort bearing registration number MG 7515. The insured was stated as one "Wan Abdullah bin Wan Ahmad Tajuddin" ("the insured"). The period of the insurance commenced on 25 June 2007 until 24 June 2008.

[4] On or about 29 November 2007, the respondent received a notice of commencement of proceedings pursuant to s. 96(2) of the RTA 1987 from the solicitors for the appellant. According to the notice, on 28 August 2007 whilst the appellant was lawfully riding on motorcycle bearing registration number WFJ 786, motorcar MG 7515 driven by the insured collided into the said motorcycle thereby causing injuries to the appellant.

[5] Investigations carried out by the respondent revealed that the insured had passed away on 19 August 2004.

[6] The respondent then filed an application to the High Court ("the proceedings") for a declaration that the insurance is void and unenforceable on the ground of non-disclosure of the material fact that the insured had already passed away at the time of the application for the renewal of the insurance.

[7] Meanwhile, on 14 July 2009, the appellant had filed an action at the Klang Sessions Court against the insured for loss and damages arising from the accident.

[8] Subsequent investigations by the respondent revealed that one Noraini binti Mansor had taken over the possession, care and control of motorcar MG 7515 after the insured's demise in 2004; the insured was the elder brother of her ex-husband. However, the change of possession of motorcar MG 7515 was not followed by a transfer and registration of the change of ownership. The insured was still the registered owner of motorcar MG 7515. Noraini binti Mansor had continued renewing the insurance in the name of the insured.

[9] On 5 January 2012, the appellant's application to intervene in the proceedings was allowed.

Parties' Respective Submissions

[10] Learned counsel for the appellant submitted that the respondent has a statutory liability pursuant to s. 96(1) of the RTA 1987 which reads as follows:

> 96. (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this

A section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[11] It was also submitted that the respondent's liability *qua* insurer was B incurred when the accident occurred on 28 September 2007.

[12] Learned counsel also argued that the appellant did not know of the fact that the insured had already passed away in 2004. There are two conflicting rights at play; the right of the respondent insurer and the right of the common man. By accepting payments of the premiums, the respondent had affirmed C the insurance policy so that it is precluded from repudiating liability. Further, since there is a statutory liability to meet in respect of third party claims, the respondent cannot place any conditions against any third party from making a recovery claim against the respondent for bodily injury to their statutory liability (see *Tahan Insurance Malaysia Bhd v. Ong Choo Tian* D *& Anor* [2004] 7 CLJ 270). In the circumstances, the right of the common man should prevail and the respondent should be liable to pay to the appellant any amount pursuant to a judgment.

[13] Learned counsel further argued that since the accident occurred on 28 September 2007, the accident is now a past event. Further, the E respondent's application for the declaration under s. 96(3) of the RTA 1987 was made after the accident; it was made after the liability was incurred. As such, it would not be in accordance with s. 96(3) of the RTA 1987 for the court to grant a declaration that the insurance is void and unenforceable (see *Kurnia Insurans (Malaysia) Bhd v. Nik Mohd Faizul Nik Mustafa & Anor* [2013] F 1 LNS 40).

[14] Learned counsel, however, conceded that the action in the Sessions Court had been withdrawn and that the claim is time barred. However, learned counsel argued that should the appeal be allowed and the declaration set aside, then he is prepared to apply for leave to file a fresh writ out of time.

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[15] In reply, learned counsel for the respondent submitted that the application to the High Court for the declaration was predicated on the ground that there was a non-disclosure of a material fact - that the insured passed away three years prior to the issuance of the insurance policy.

H **[16]** Further, the respondent's application for the declaration was granted by the High Court pursuant to s. 96(3) of the RTA 1987. Accordingly, the insurance policy is void and unenforceable. The appellant is not without recourse; he is at liberty to institute legal action against Noraini Binti Mansor directly. It was also argued that the court should not lend its aid to an I unenforceable transaction.

Findings Of The Court

[17] In this appeal, it is not disputed that at the time of the renewal of the insurance policy the insured was no longer living. The appellant's case is premised on the argument that the date the liability was incurred is the date of the accident. On the other hand, the respondent's reply is that if the appellant's argument is correct, then they must make their application before the date of the accident. If so, the respondent will be precluded from applying for a declaration if it is subsequently discovered that the policy is voidable or unenforceable for material non-disclosure.

[18] Accordingly, the principal issue that falls to be determined is this: whether the date the liability was incurred is the date of the accident or the date when judgment on liability is pronounced?

[19] Subsection (3) of the s. 96 RTA 1987 reads as follows:

> (3) No sum shall be payable by an insurer under subsection (1) **if before the date the liability was incurred**, the insurer had obtained a declaration from a court that the insurance void and unenforceable:
>
> > Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects **any judgment obtained in proceedings commenced before the commencement of that action** unless, before or within seven days after the commencement of that action, he has given notice thereof to the person, who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.
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> (emphasis added)

Statutory Interpretation

[20] In construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself (see *NKM Holdings Sdn Bhd v. Pan Malaysian Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39 (SC); *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 2 MLJ 113 (FC); *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449 (SC); *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 6 MLJ 581 (FC)).

[21] Therefore, in construing any statutes, the court will firstly, look at the words in the legislation and apply the plain and ordinary meaning of the words in the statute. If there is any ambiguity to the words used, the court is duly bound to accept it even if it may lead to mischief. But where the

language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable. But if the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used (see *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (Malaysia) Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385; *Chin Choy & Ors v. Collector of Stamp Duties* [1978] 1 LNS 26; [1979] 1 MLJ 69; *Yeo Peck Chie v. KS Gill & Co* [1946] 1 LNS 35; [1946] MLJ 131; *Magor & St Mellons Rural District Council v. Newport Corporation* [1952] AC 189 (HL); *Woodward v. Watt* [1853] 2 E & B 452; and *Warburton v. Loveland* [1832] 2 D & CL (HL) 480).

[22] In *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209; [2009] 1 MLJ 21 FC, Ariffin Zakaria FCJ (later CJ) held that the fundamental rule of interpretation is that a statute is to give effect to the intent of the Legislature, and that intention has to be found by an examination of the language used in the statute as a whole. Where the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect is intended, and if different language is used in contiguous provisions, it must be presumed to have done so designedly. Where the statute has an ordinary and natural meaning, the court has a duty to enforce that meaning even if the result is inconvenient, impolite or improbable.

[23] In *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449 FC, the Federal Court enunciated on the application of s. 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes. Zulkefli CJ (Malaya) speaking for the Federal Court had this to say at pp. 35-35 (CLJ); pp. 457-458 (MLJ):

> Section 17A of the Interpretation Acts provides that:
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> A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act of not) shall be preferred to a construction that would not promote the purpose or object.
>
> On the proper application of the provision of the said s. 17A of the Interpretation Act we would refer to the case of *All Malayan Staff Union v. Rajasegaran & Ors* [2006] 6 MLJ 97 wherein the court had laid down the principles, *inter alia*, as follows:
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> In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:
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> (1) Legislation is always to be understood first in accordance with its plain meaning.
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> (2) Where the plain meaning in doubt the court will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.

(3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.

(4) Where a reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the results will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

[24] The words "the date the liability was incurred" in sub-s. (3) is not defined in the RTA 1987. In *Littlewood v. George Wimpey & Co* [1953] 2 All ER 915 at 921, Lord Denning LJ (as he then was) thought that 'liable' denotes that "... a person is responsible at law". Similarly, the *Oxford Companion to Law* explaining the word "liability" says: "A person is said to be under a liability when he is, or at least may be, legally obliged to do or suffer something".

[25] According to *Words, Phrases & Maxims - Legally & Judicially Defined*, Anandan Krishnan Lexis Nexis Vol 10, "Liability" is defined as responsibility; the state of one who is bound in law and justice to do something where may be enforced by action. Liability may arise from contracts express or implied, or in consequence of torts committed (*Barnett v. King* (1891) 1 Ch 4; *Wolmershausen v. Gullick* (1893) 2 Ch 514; *Ellis v. Pond* (1898) 1 QB 426; (1898) 1 QB 554.

Meaning Of Words 'The Date The Liability Was Incurred' Of Sub-s. (3)

[26] As a starting point, the proviso to the subsection should be read together with the subsection. Subsection (3) provides that the insurer shall not be liable to pay any sums if "before the date the liability was incurred" the insurer has obtained a declaration from a court. The proviso to sub-s. (3) also provides that the insurer will not benefit from the subsection if the application for the declaration was made "as respects any judgment obtained in proceedings commenced before the commencement of the action ...". Put another way, the proviso provides that the insurer will still be liable if the application for the declaration was only made after judgment was obtained.

[27] In our judgment, a reading of the proviso would clearly advance the meaning of "the date the liability was incurred" and which date is the date when judgment has been obtained.

[28] In a running down action, the plaintiff's claim for damages is based on the tort of negligence. Prior to the trial of the action, liability in damages has not yet been incurred. What the plaintiff has is a cause of action in negligence which, if proven, will subject the defendant to liability in damages. Therefore, "the date liability is incurred" within the meaning of sub-s. (3) must be held to have the meaning that liability is only incurred when judgment on liability is pronounced by a court after full trial.

[29] In this instant case, no judgment has been obtained; the action having been withdrawn by the appellant with liberty to file afresh. When the application for the declaration by the respondent was filed, there was no judgment. As such, the proviso does not apply to deny the respondent of the benefit of the declaration it had obtained. Consequently, the respondent is entitled to the benefit of the declaration obtained pursuant to sub-s. (3) of the s. 96 RTA 1987.

[30] For the foregoing reasons, we are unable to agree with the findings of the learned judge in the High Court in *Kurnia Insurans (Malaysia) Bhd v. Nik Mohd Faizul Nik Mustafa & Anor*, *(supra)*.

[31] Accordingly, the appeal was dismissed with no order as to costs.